

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

Docket No. 141,784

## ORDER

**ON** the 27th day of January, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated November 24, 1993, came on for oral argument.

## APPEARANCES

The claimant appeared by and through her attorney, James Zongker of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Vincent Bogart of Wichita, Kansas. There were no other appearances.

## RECORD

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

## STIPULATIONS

The Appeals Board adopts the stipulations listed in the November 24, 1993, Award.

### **ISSUES**

- (1) The nature and extent of claimant's disability, if any.
- (2) The liability of the Kansas Workers Compensation Fund, if any.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The claimant, Joyce J. Willson, has suffered a forty-six percent (46%) permanent partial work disability as a result of the personal injury by accident arising out of and in the course of her employment with the respondent from September 1, 1989, through September 29, 1989.

The claimant began working at Boeing in May 1987. In September 1989 her job duties included drilling out bulkheads approximately four to five hours per day using a hand-held drill. This job required her to drill approximately one-hundred holes per hour. The other three to four hours per day were spent putting in hug bolts. This job also required the use of vibratory tools. Most of her work was done at or above chest level. Between September 1 and September 29, 1989, she developed problems in her right wrist, arm, elbow, shoulder and up into her neck. She reported her complaints to her supervisor and was treated at Boeing Central Medical.

She last worked at Boeing on September 29, 1989. She was last seen at Central Medical on January 3, 1991. At that time she was given permanent restrictions against heavy drilling, bucking rivets or riveting, and the use of vibratory tools. She also was given a fifty (50) pound weight limit and restricted from working from unprotected heights.

Boeing referred her for treatment with Dr. Paul Lesko, a board-certified orthopedic surgeon. He first saw claimant on October 17, 1990. She had complaints of discomfort in the trapezius area, right shoulder, elbow and wrist. He diagnosed facet inflammation of the cervical spine and tendonitis of the wrist and elbow. Dr. Lesko related the shoulder problem to the neck in addition to trapezius strain or inflammation. He last saw claimant on December 31, 1990, at which time he released her to return to work with the restriction of no power tools. He rated her at five percent (5%) to the right upper extremity and five percent (5%) to the cervical area. The right upper extremity rating he converted to three percent (3%) to the body as a whole which then combined with five percent (5%) to the cervical area for an eight percent (8%) body as a whole functional impairment rating.

Claimant was examined by Ernest R. Schlachter, M.D. on April 30, 1992, at the request of her attorney. He diagnosed chronic cervical sprain and overuse syndrome of the right upper extremity. He found claimant to have a five percent (5%) permanent partial impairment of function to the body as a whole due to the cervical sprain and a five percent (5%) permanent partial impairment of function to the right upper extremity due to the overuse syndrome. He converted the right upper extremity rating to three percent (3%) whole body which combined with the five percent (5%) whole body rating for the cervical spine for an eight percent (8%) permanent partial impairment to the body as a whole. Dr.

Schlachter testified that claimant should be permanently restricted from lifting over thirty-five (35) pounds on a repetitive basis with the right arm with no lifting above the horizontal. She should also be restricted from repetitive gripping and grasping motions with the right arm and should not use vibratory tools or work in cold environments. He defined repetitive gripping and grasping as thirty (30) times per hour. The lifting limitation of thirty-five (35) pounds no more than thirty (30) times per hour with the right arm means that she could lift more than thirty-five (35) pounds if she could use the left arm and carry a balanced load.

A vocational rehabilitation plan was developed by Dan Goldstein, a certified rehabilitation counselor with the State of Kansas. The plan was written using a combination of priorities five and six. It called for job placement as a manager, assistant manager, or manager/trainee in marketing or as a leasing agent or property manager. The training consisted of math and computer keyboard courses. Mr. Goldstein testified that claimant had previous vocational technical training in business including math, typing, and fashion merchandising. On vocational testing she demonstrated extremely high aptitudes in reading, spelling, and math as well as having a high IQ. Also, she expressed interest in doing the type of work proposed by the plan. The plan proposed returning her to work at a wage of \$400.00 per week, which was admittedly less than the average weekly wage claimant was earning with Boeing.

According to Mr. Goldstein, claimant completed a semester of training at a vocational technical school consisting of a course in math and a course in computer keyboard training. However, she did not fully cooperate in the job search. She did not follow-up with all job leads she was given and placement was unsuccessful. Accordingly, a plan amendment was written which provided for an additional semester of training and job search. The claimant did not complete this training due to health problems unrelated to this claim. She ultimately obtained part-time employment on her own at a dry-cleaners. Mr. Goldstein was in contact with the store manager about the possibility of an assistant manager's position for the claimant but the claimant quit her job before that could occur. In his opinion there was a strong possibility that claimant could have gotten into the property management field as called for in the original plan as there were quite a few openings. He stated claimant had the aptitude and personality for that type of work. In his opinion, she had the ability to earn a wage in the range of \$7.00 to \$10.00 per hour. Claimant was provided with job leads that paid in the \$7.00 to \$10.00 range. Those jobs would provide fringe benefits but he did not know the value of those benefits.

The deposition of Jerry D. Hardin was taken on behalf of the claimant. Mr. Hardin is president and owner of Personnel Services, Inc., a personnel human resource consulting firm. He performed a labor market evaluation taking into consideration the restrictions given by Dr. Schlachter. In his opinion, claimant's ability to perform work in the open labor market has been reduced by fifty to sixty percent (50-60%) because of injuries she sustained at work and the resulting permanent restrictions. He considers claimant capable of earning \$200.00 per week based upon \$5.00 per hour and a forty (40) hour work week. Using Dr. Lesko's restrictions, he would place claimant's loss of ability to perform work in the open labor market at ten to fifteen percent (10-15%).

Expert vocational testimony was presented on behalf of respondent by Stephen L. Sturdevant, Ph.D. Dr. Sturdevant is owner and president of Forensic Services Corporation. He regularly provides expert witness testimony on economic, personal injury and workers compensation topics. In his opinion and utilizing the restrictions recommended by Dr. Lesko, he would place claimant's loss of labor market access in the range of five to ten

percent (5-10%). Using Dr. Schlachter's restrictions, her loss of labor market access would be ten to fifteen percent (10-15%). He considered claimant capable of earning \$6.50 per hour as the bottom end of her wage-earning potential and the top end of the range would be \$18,000.00 to \$20,000.00 per year. These figures do not take into consideration fringe benefits.

The Appeals Board finds the restrictions imposed by Dr. Schlachter to be more persuasive than those of Dr. Lesko. Both physicians were essentially in agreement as to the diagnosis, nature and extent of claimant's injuries. They gave identical functional impairment ratings. However, Dr. Lesko imposed no restriction as to weight, nor did he restrict repetitive motion in the use of the upper extremity. The Appeals Board does not believe Dr. Lesko's restrictions are commensurate with the injury. Using the restrictions of Dr. Schlachter, Mr. Hardin found claimant to have suffered a fifty to sixty percent (50-60%) loss of access to the open labor market. Using those same restrictions, Dr. Sturdevant found claimant to have suffered a ten to fifteen percent (10-15%) loss. The Appeals Board agrees with Dr. Sturdevant that Mr. Hardin's numbers may overstate the claimant's loss, however, the Appeals Board believes that Dr. Sturdevant's numbers tend to understate the loss. Therefore an average of the two opinions is found to be a reasonable method of determining loss of labor market access in this instance. By averaging the opinions of the two experts, claimant's loss of access to the labor market is thirty-three and three-fourths percent (33.75%).

The Appeals Board finds the claimant capable of earning \$7.00 per hour post-injury. This is consistent with the low-end of the range her vocational counselor, Mr. Goldstein, testified was the actual entry-level wage for the positions he found as a part of the job placement plan.

The parties have stipulated that claimant's average weekly wage at the time of her injury was \$516.53. This represents a fifty-five percent (55%) loss of ability to earn comparable wage. Averaging the two loss factors, as was done in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), results in a forty-six percent (46%) work disability for which claimant is entitled to permanent partial general disability benefits.

(2) The Appeals Board finds that the respondent did not retain claimant with knowledge of a handicap and accordingly the Kansas Workers Compensation Fund has no responsibility for payment of any portion of the award in this case.

The Kansas Workers Compensation Fund becomes responsible for payment of all or a portion of an award when it is established that the employer employed or retained the claimant with knowledge of the handicap and the handicap at issue either: (a) would not have occurred but for the pre-existing handicap; or, (b) the pre-existing handicap contributes to the disability. On appeal, respondent contends that it retained claimant with knowledge of a handicap and the injury at issue in this claim was contributed to at least in part by that pre-existing condition. The Kansas Workers Compensation Fund, on the other hand, contends that the record shows only that respondent knew of prior medical treatment, not of a condition which qualifies as a handicap. In addition, the Kansas Workers Compensation Fund argues that claimant's current injuries would have occurred regardless of the prior condition.

After review of the record, the Appeals Board finds that respondent did have knowledge of a pre-existing condition but that it did not have knowledge of a handicap.

The pre-existing injury at issue in this claim is a shoulder injury of August 1988. Dr. Lesko likewise treated claimant for that condition. He testified that the pre-existing condition made her more prone or susceptible to re-injury and would estimate fifty percent (50%) of her present impairment pre-existed the September 1989 injury. He would apportion claimant's current disability with regard to the right upper extremity as fifty percent (50%) due to the problems which pre-existed and fifty percent (50%) as the result of the new injury. He testified that it is also likely that her prior trapezius problems contributed to her developing cervical problems. Claimant testified that she injured her right shoulder in July 1988 while working at Boeing as the result of lifting. She recalls missing approximately one week of work whereupon she was returned to her same job without restrictions. Her supervisor told her to get help with heavy lifting and from July 1988 until September 1989 she did try to avoid heavy lifting. Claimant had no further problems with her right shoulder until her job duties were changed September 1, 1989. She testified that her 1988 injury involved a different sensation in a different part of her body from the injury for which she is now making claim. The symptoms she relates to the lifting injury in 1988 did not return. Although she did have some shoulder pain from both the 1988 and 1989 injuries, it was a different kind of pain in a different part of her shoulder. She was released to return to work in 1988 with no mention of any permanent impairment and with no restrictions. She continued to perform her regular job duties until September 1989.

In support of its argument that respondent did not have knowledge of a handicap, the Kansas Workers Compensation Fund emphasizes the fact that in 1988 Dr. Lesko released claimant without restrictions and she thereafter performed her regular duties. Respondent points out that claimant was treated by an authorized physician who diagnosed trapezius strain with respect to both injuries. Furthermore, claimant returned to work and was told by her supervisor to avoid heavy lifting. On balance, the Appeals Board believes that the evidence does not establish that respondent retained claimant as an employee with knowledge of a handicap.

### **AWARD**

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS AGAINST** the respondent and its insurance carrier for an accidental injury sustained from September 1, 1989 through September 29, 1989, and based on an average weekly wage of \$516.53, for 64 weeks of temporary total disability compensation at the rate of \$271.00 per week in the sum of \$17,344.00 and 351 weeks of compensation at the rate of \$158.41 for 46% permanent partial general bodily disability, in the sum of \$55,601.91 for a total award of \$72,945.91.

As of June 17, 1994, there is due and owing claimant 64 weeks of temporary total compensation at \$271.00 per week in the sum of \$17,344.00, and 182 weeks of permanent partial compensation at the rate of \$158.41 per week in the sum of \$28,830.62 for a total of \$46,174.62 which is past due and owing and ordered paid in one lump sum less compensation previously paid.

The remaining 169 weeks are to be paid at \$158.41 per week until fully paid or further order of the Director.

Costs are hereby assessed to the respondent to be paid directly as follows:

Barber & Associates	
Transcript of Regular Hearing	\$82.05
Kelley, York & Associates	
Continuation of Regular Hearing	\$268.95

Deposition of Dr. Ernest R. Schlachter	122.35
Deposition of Jerry Hardin	304.60
	<u>\$695.90</u>

Deposition Services	
Deposition of Dr. Paul D. Lesko	\$281.20
Deposition of Don Goldstein	349.00
Deposition of Stephen L. Sturdevant	<u>349.20</u>
	<u>979.40</u>

Future medical is approved only upon proper application to the Director.

Claimant's attorney fees are approved subject to provisions of K.S.A. 44-536.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 1994.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: James Zongker, PO Box 47370, Wichita, KS 67201  
Vaughn Burkholder, 700 Fourth Financial Center, Wichita, KS 67202  
Vincent Bogart, 301 N. Main, Suite 1600, Wichita, KS 67202  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director